

Decision 01-08-067 August 23, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Office of Ratepayer Advocates,

Complainant,

vs.

Pacific Bell Telephone Company (U 1001 C),

Defendant.

Case 00-08-053
(Filed August 25, 2000)

OPINION GRANTING COMPLAINT

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Defendant.

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OPINION GRANTING COMPLAINT

I. Summary

Complainant Office of Ratepayer Advocates (ORA) alleges that Pacific Bell Telephone Company (Pacific) violated various statutes and the Commission's General Orders when it implemented its Prompted Repeat Dialing service, because Pacific believed Prompted Repeat Dialing to be the same service as its existing Repeat Dialing service. We find that Repeat and Prompted Repeat Dialing are different services. In reaching this conclusion, we examine how the respective services function both on Pacific's system and from customers' perspective.

Because Pacific violated various statutes and General Orders in implementing Prompted Repeat Dialing, we direct the following remedies: (1) Pacific must obtain affirmative consent from a customer before deploying Prompted Repeat Dialing on that customer's line, and when Pacific has deployed Prompted Repeat Dialing without such consent, Pacific must obtain such consent or discontinue the service; (2) Pacific shall refund to all non-published California residential customers the \$0.28 per month they pay to be a non-published customer for each month that Pacific deployed Prompted Repeat Dialing on these customers' lines without their express consent; and (3) Pacific shall file a new advice letter with separate tariff sheets for Prompted Repeat Dialing, on a subscription and per use basis. We direct the refund because we conclude that, in implementing Prompted Repeat Dialing, Pacific violated its tariff with non-published residential customers which states that Pacific will not contact these customers by telephone on an unlisted number for unsolicited sales efforts.

II. The Controversy Between ORA and Pacific

A. Repeat Dialing and Prompted Repeat Dialing

Many of ORA's allegations depend on whether Prompted Repeat Dialing is the same, or a different service from Repeat Dialing. Therefore, a brief description and chronology of Repeat Dialing and Prompted Repeat Dialing is useful in order to understand the controversy.

Pacific's Repeat Dialing Service allows the customer to perform an activation procedure (dialing "*66" from most telephones, or in the case of a rotary phone, "1166") to automatically redial the last number called. The customer can do so whether the call was answered, unanswered, or busy. Once activated, the system would attempt to connect the call for up to 30 minutes, and would alert the customer with a distinctive ring when both the called party and the customer's line were free.

Pacific first tariffed its Repeat Dialing service in 1992 after the Commission approved this service in Decision (D.) 92-06-055. Initially, Pacific offered Repeat Dialing on a subscription only basis where a customer had to pay a monthly charge to access the service.¹

In 1996, Pacific began offering Repeat Dialing on a pay per use, as well as a subscription only basis. The pay per use service similarly required the customer to affirmatively perform an activation procedure, i.e., dial "*66". The

¹ Pacific's tariff described the Repeat Dialing offered by subscription:

"Repeat Dialing (USOC: CRD) permits the customer to have calls automatically redialed when the first attempt reaches a busy number. The line is checked every 45 seconds for up to 30 minutes and alerts the customer with a distinctive ringing pattern when the busy number and the customer's line are free. The customer can continue to make and receive calls while the feature is activated."

advice letter requesting authority to offer this service set the price for Repeat Dialing at \$0.75 per activation and established a floor and ceiling price for this service.² Pacific's tariff for pay per use Repeat Dialing states that it functions the same as the service offered on a subscription basis.

In April and May, 2000, Pacific conducted a trial in three California cities, where it sought customer reaction to a service which began by interrupting customers' busy signals after one second to play the following prompt:

"The number is busy. For 95 cents, let Repeat Dialing call you back when the line is free. To use it, just press 3. If you subscribe to Repeat Dialing, there is no additional charge."

On May 26, 2000, Pacific began including a "Prompted Repeat Dialing Launch Notice" carrier bill message at the end of all customer bills. In part, the "Launch Notice" read as follows:

"We're improving Busy Signals in your area soon ... through an enhancement to Repeat Dialing.

"Between July and October, we're phasing in a new Repeat Dialing feature. When you reach a busy number, instead of hearing the usual busy signal, you'll hear a recording that will ask you if you want the call to be automatically redialed for you. If you choose, Repeat Dialing will automatically

² Pacific's Advice Letter 17909 contained the following description of usage sensitive Repeat Dialing:

"The Repeat Dialing feature, also known as Automatic Callback, is an outgoing call management feature that enables a customer to perform an activation procedure and automatically re-dial the last number called from his/her station. This will apply regardless of whether the original call was answered, unanswered, or encountered a busy tone. The system monitors the calling and called stations for idle condition and will attempt to connect the call for up to 30 minutes."

check the line you are trying to call every 45 seconds for the next 30 minutes. When your call is ready to go through, you'll hear a special ring. This new recording will only play when your call can be automatically redialed. ...

“IMPORTANT: If you have a dedicated line for fax or modem, the prompt may slow down the speed with which this equipment retries on a busy condition. You may call to have the Repeat Dialing Prompt removed at no charge.”

In July, Pacific began placing the prompt linked with Repeat Dialing on customers' lines on a statewide basis. According to ORA, the placement of this prompt constituted, in effect a new service which ORA calls Prompted Repeat Dialing. ORA believes this service is distinct from Repeat Dialing, because the customer activates Repeat Dialing via coded dialing (“*66”) whereas Prompted Repeat Dialing is a “passive service” (i.e., the prompt is automatic) activated within Pacific's switching equipment when a busy condition is detected on a call between two customers. Pacific, on the other hand, believes that Repeat and Prompted Repeat Dialing are the same service, and the prompt is merely an enhancement or reminder to the customers of an available service they may use in order to complete their call.

B. The Allegations of the Complaint

In offering Repeat Redialing and Prompted Repeat Dialing, ORA complains that Pacific violated:

- Pub. Util. Code § 451's provision that service be “adequate, efficient, just and reasonable” for Pacific's patrons and the public by the manner in which Pacific offers Prompted Repeat Dialing (by interrupting the busy signal with a recorded message);
- Pub. Util. Code § 2889.4 by, among other things, failing to provide detailed information about the blocking options and postcard-sized bill insert that subscribers could return with their phone bill should they choose to block Prompted Repeat Redialing;

- the Commission's General Order (GO) 96-A by raising the rates for both repeat dialing services, by changing the Repeat Dialing Service and by adding the Prompted Repeat Dialing Service without proper notice to customers or the Commission;
- Pub. Util. Code § 454 and § 491 by raising the rates for both repeat dialing services and by changing the service to non-published customers without proper notice to either the customers or the Commission;
- Pub. Util. Code § 702 by failing to comply with the Commission's General Orders relating to rate increases and changes in service;
- Pub. Util. Code § 495 by failing to file a tariff describing Prompted Repeat Dialing;
- Pacific's Tariff Schedule A.2 by implementing Prompted Repeat Dialing on non-published telephone customers' lines without their consent; and
- the right of privacy guaranteed by the California Constitution.

Pacific denies each of these allegations.

C. Burden of Proof

Under Pub. Util. Code § 1702, a complainant must prove an alleged violation of a specific standard contained in a statute, rule or order of the Commission, or a tariff which has been approved by the Commission. The standard of proof is by a preponderance of the evidence. (See, e.g., D.97-05-089, 72 CPUC2d 621, 633-634 ["It is well settled that the standard of proof in Commission investigation proceedings is by a preponderance of the evidence."])

III. Procedural Background

ORA filed this complaint on August 25, 2000, and Pacific filed a timely answer on October 20, 2000. In its answer, Pacific challenged ORA's standing to file the complaint.

The Commission held a prehearing conference (PHC) on November 6, 2000. At the PHC, the parties were directed, among other things, to brief the

issue of ORA's standing. After the PHC, Pacific also filed a motion to dismiss, alleging that ORA lacked standing and that the proper forum for ORA to raise its arguments was in the advice letter process.

On December 4, 2000, Assigned Commissioner Wood issued the Scoping Memo, which designated Administrative Law Judge (ALJ) Econome as the presiding officer. The Scoping Memo also granted The Utility Reform Network (TURN) intervenor status.³ On December 18, 2000, the ALJ issued a ruling denying Pacific's motion to dismiss, ruling that ORA had standing to bring this complaint and that many of the issues ORA raised in the complaint went beyond those addressed in the advice letter process.

The Commission held evidentiary hearings on February 26 and 27, 2001, and the case was submitted on April 6, 2001 with the filing of reply briefs.

IV. Discussion

A. ORA Has Standing to File this Complaint

Pub. Util. Code § 309.5 (a) provides that there is "within the commission a division to represent the interests of public utility customers and subscribers in commission proceedings. The goal of the division shall be to obtain the lowest possible rate for service consistent with reliable and safe service levels." ORA is the Commission division charged by § 309.5 with representing the interests of public utility customers in Commission proceedings.

All parties agree that ORA can participate in Commission proceedings such as applications initiated by a utility, investigations initiated by the

³ TURN was permitted to intervene to assist, but not duplicate, ORA's efforts. However, after intervention was granted, TURN did not participate in either the evidentiary hearings or briefing.

Commission, and complaint proceedings initiated by another entity such as TURN. However, Pacific challenges ORA's standing to initiate a complaint against a utility.

A December 18, 2000 ALJ ruling, which we affirm in this decision, denied Pacific's motion to dismiss this complaint due to ORA's alleged lack of standing. The ruling reasoned that § 309.5, when read together with § 1702, permits ORA to file a complaint before the Commission. From the ruling:

"Section 309.5 charges ORA with the duty to represent utility customers and subscribers in Commission proceedings. The plain language of the statute (i.e., the term "represent") does not prohibit ORA from initiating a complaint against a utility in order to represent the interests of public utility customers. To read this statute otherwise would deprive ORA of a fundamental tool to represent the interests of public utility customers. It would relegate ORA to a defensive position, with the ability to react to a utility proposal, to participate in another person's complaint, or to participate in a Commission investigation, but would not permit ORA to initiate a complaint on behalf of the very interests it is charged to represent. This narrow reading of the scope of ORA's ability to represent the interests of customers is not supported by a plain reading of the statute and ties ORA's hands in carrying out its specific mandate.

* * *

"Pacific next argues that Pub. Util. Code § 1702, and Rule 9 of the Commission Rules of Practice and Procedure also preclude ORA from initiating a complaint. Section 1702 provides, in relevant part,

'Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body

politic or municipal corporation, by written petition or complaint, ...’

“Pacific states that because ORA is not the Commission, nor any of the other people or entities defined by § 1702, it does not have standing to file this complaint. ORA disagrees, arguing that § 1702 authorizes complaints to be made by ‘persons’, which term Pub. Util. Code § 205 states includes ‘individuals’. ORA argues that ‘individuals’ include Pacific’s ratepayers, and thus, ORA as the representative of those ratepayers.

“Section 1702, when read together with § 309.5, permits ORA to file a complaint. To read these sections otherwise would undercut the type of representation ORA can offer to the interests of public utility customers. Moreover, under the complaint process, Pacific is afforded procedural safeguards in that ORA has the burden to plead as well as to prove a cause of action against Pacific. This is distinct from ORA’s burden when it participates in an application, where generally the utility has the burden of proof.

“As telecommunications services have become more competitive, more utilities have entered the marketplace. Often, customers who believe they are harmed by a utility’s implementation of a particular service may not pursue an action on their own, where the cost of representation is much greater than the costs at stake in the litigation on a per customer basis. Yet, the Commission may wish such allegations, which may involve serious wrongdoing, to come to its attention for review on the merits. In order to preserve public confidence in the years ahead, the interests of customers need to be adequately represented before the Commission. ORA is a division that can do so, provided it can utilize the same tools as others before the Commission to offer such representation.” (December 18 ALJ ruling at pp. 2-5, footnote omitted.)

In its brief, Pacific disagrees with the conclusions in the December 18 ALJ ruling, and also argues that the evidentiary hearings provided further

support for its position that ORA lacks standing. Pacific characterizes two ORA contacts with decisionmakers as prohibited ex parte communications, in violation of the Commission's Rules of Practice and Procedures, and argues that ORA's lack of procedures to ensure compliance with the Commission's ex parte rules is evidence of ORA's lack of authority to file complaints.

We disagree. ORA's authority to initiate this complaint is statutory and its internal procedures are not relevant to this authority.⁴

Pacific also argues that ORA lacks standing because one of its witnesses, Dr. Johnston, was unable to state who in ORA decided to initiate the complaint and to make the press contact. However, while a witness' lack of knowledge in a given area may affect credibility, it does not affect standing.

B. Repeat Dialing and Prompted Repeat Dialing are Distinct Services

Between July and October 2000, Pacific used its customers' telephone lines to impose a new bundled offering without the customers' express consent. The new bundled offering is the prompt described above linked to Pacific's Repeat Dialing service. The issue of first impression presented here is whether

⁴ ORA argues that its two contacts with a decisionmaker were not prohibited ex parte contacts. According to ORA, the two contacts in question, one advising the President of the Commission of a press contact regarding the complaint, and one responding to a question as to the definition of repeat dialing, were made according to ORA's internal procedures.

We are confident that ORA's new director will ensure that any future such contracts strictly comply with the Commission's ex parte rules.

this bundled offering is a different service from Repeat Dialing, as ORA maintains, or whether it is merely an enhancement of an existing service, as Pacific contends.

In deciding whether Pacific's Prompted Repeat Dialing constitutes a new service, we look to the same functionality standard we used in granting Pacific authority to offer pay per call Repeat Dialing: Does Prompted Repeat Dialing function the same as Repeat Dialing? We consider this question by looking at how the services function on Pacific's system, and at how they function from the customers' perspective.

We find that when Pacific substantially modified its existing Repeat Dialing services by adding the prompt, it began offering a new service, Prompted Repeat Dialing. Pacific installed this new feature on one of the most basic components of "plain old telephone service," the busy signal. Repeat Dialing does not affect the traditional "busy signal" while Prompted Repeat Dialing does. A customer can opt out of this new service, i.e., the customer can call to have the prompt removed. In that case, the customer would no longer be able to activate Prompted Repeat Dialing. However, a customer who opts out would still be able to hang up, dial "*66," and activate Repeat Dialing.

From a customer's perspective, the two services function differently in other ways. Repeat Dialing, unlike Prompted Repeat Dialing, functions only if a customer chooses to use the service. A customer activates Repeat Dialing by hanging up the telephone and dialing in a code, in this case "*66." In contrast, Prompted Repeat Dialing activates without the customer's affirmative choice, with the prompt playing each time the customer encounters a busy signal. Although the customer may hang up without choosing to activate the repeat dialing portion of the service (in this case, by dialing "3"), the customer has no affirmative choice whether or not to have the prompt appear on his or her line in

the first instance. The prompt appears, whether the customer wants it or not.⁵ This is a distinction with a substantial difference, and compels the conclusion that the two offerings are in fact distinct services, even though they may achieve the same outcome.⁶ Furthermore, a customer can utilize Repeat Dialing to redial a number if the number was answered, unanswered, or encountered a busy signal. In contrast, Prompted Repeat Dialing can only redial a number that was busy.

The two services also function differently on Pacific's system. Before any of the functions described in Pacific's tariff for Repeat Dialing take place, Prompted Repeat Dialing uses functions of Pacific's system. Prompted Repeat Dialing is activated by a trigger notification within Pacific's system that a busy condition exists on the called party end of an outbound customer call. The trigger sends a message to the service control point that the busy condition exists, and the service control point in turn sends a recorded message about the availability of the repeat dialing ("3") service, rather than sending a busy tone.

Pacific argues that no call "set up" occurs when the prompt plays, that no outbound message is sent, and thus, there is no impact on Pacific's switching network. Pacific also argues that the repeat dialing function operates the same whether the prompt is played or not played. However, implementing the prompt causes activity on Pacific's system that is different from, and in addition

⁵ Although a customer can call Pacific's business office to request to have the prompt removed, Pacific has placed the burden on customers who do not want this service to eliminate it.

⁶ For example, many telephones have a redial feature on them, and customers can press the redial button to have the last number they called automatically redialed, without using either Repeat Dialing or Prompted Repeat Dialing.

to, the system activity of Repeat Dialing alone. Moreover, playing the 18-second prompt on customers' lines when they encounter a busy signal means that many lines remain busy longer. While the line is engaged with the busy signal or the prompt, no other caller can get through and call waiting is disabled.

In arguing that Prompted Repeat Dialing is merely an enhanced Repeat Dialing service, Pacific also argues that the only costs the prompt causes are non-volume sensitive costs; thus, the price floor and corresponding ceiling the Commission has previously approved for Repeat Dialing is appropriate for Prompted Repeat Dialing, because only the volume-sensitive portion of the total Long Run Incremental Cost of a service is used to set the price floor for that service. However, even assuming Pacific's position is correct, it does not persuade us to reach a different result, because different services can have similar costs.

C. Does Pacific's Implementation of Prompted Repeat Dialing Violate Pub. Util. Code § 451?

Pub. Util. Code § 451 provides, in part, that "any service rendered or to be rendered shall be just and reasonable. ... Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service ... as [is] necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public."

We find that Pacific's implementation of Prompted Repeat Dialing violates § 451. Pacific used the traditional busy signal to unilaterally place this new service on customers' telephone lines without their consent or the approval of the Commission. Although Pacific provided for customers to call the Business Office to have the service removed, we find that customer safety, health, comfort, and convenience was disregarded when Pacific placed the burden on customers to eliminate a service which they did not request to begin with, which they do

not affirmatively activate, and which may interfere with their other equipment, such as fax machines and modems.⁷

1. Pacific's Decision to Implement Prompted Repeat Dialing

Pacific decided to implement this new service without evidence of customer need in that Pacific did not analyze whether California customers desired this new service. Although Pacific performed a "Marketing Service Description" (a marketing study) discussing the customer benefits that Pacific expected to occur,⁸ Pacific never performed an analysis to determine whether California customers agreed that they wanted Prompted Repeat Dialing placed on their telephone lines. Moreover, this same marketing study called the new service a "self-advertising service." This description of Prompted Repeat Dialing, which we consider accurate, raises the disturbing possibility that Prompted Repeat Dialing is essentially advertising that Pacific's customers are

⁷ In fact, Pacific recognized the issue of receiving advance customer consent as a pivotal issue. One of Pacific's documents includes the question: "Why doesn't Pacific Bell ask customers to sign up to hear this message on their lines instead of unilaterally putting this on all customer lines?" We do not agree with Pacific's answer that it was entitled to do so because this option makes it easier for customers to activate the repeat dialing portion of the service. In fact, Pacific did not even discuss internally the option of having customers sign up (i.e., give their advance consent) to have Prompted Repeat Dialing implemented on their lines.

⁸ The customer benefits that Pacific identifies are (1) time savings; (2) convenience of not having to remember additional steps to complete the call; (3) not having to listen repeatedly to busy signals; (4) efficiency from not having to redial busy numbers; (5) increased awareness of the availability of the repeat dialing service; and (6) increased caller control over their calls.

We may grant for the sake of argument that some customers might choose Prompted Repeat Dialing on account of these "benefits." That some customers might freely choose a service does not justify imposing that service on all customers.

compelled to listen to in place of the traditional busy signal. (See e.g., Section IV.E.2.)

2. Pacific's Trial for Prompted Repeat Dialing Elicited Negative Response

Although Pacific conducted a trial for Prompted Repeat Dialing in Visalia, Concord, and San Diego between April 4 and May 19, 2000, Southwestern Bell Corporation (SBC) had already made the decision to implement Prompted Repeat Dialing in California prior to the trial. Thus, the purpose of the trial was to gauge customer reaction to the system change and to test three busy signal lengths, not to determine whether or not to implement the new service in California. Furthermore, prior to the trials, Pacific knew of concerns that Prompted Repeat Dialing could cause problems with the operation of faxes and modems.

During the trials, 179,700 households were invited to provide their opinion about the prompt, with 79 customers responding and 44 providing open-end comments. A total of 75% disliked the service and 42 of the 44 open-end comments were negative. Moreover, 355 persons in the trial area called to block the service even though the blocking information was provided in very small print and directed these customers to call a separate 800 number rather than the number to be used for comments.

Pacific's own summary of its trial described the 44 comments as follows:

"Received 44 open-end comments, all but 2 were negative and 16 specifically mentioned Internet connection problems.

"Internet: primarily mentioned dial-up problems, e.g. interfered with ability to use AOL or to roll over to alternative phone number; lengthened time to log on.

“General Dislikes: objections to us automatically putting on line and requiring them to ask for its removal; think it’s a gimmick for phone company to make more \$\$, to nickel and dime customers; think it’s too expensive; object to having to hear message before hearing busy signal (annoying).

“Concept: some believe it simply isn’t needed; have repeat dial button on phone; think of message as an ‘infomercial.’ (Exhibit C-3, Attachments to Footnote 10, “Prompted Repeat Dialing; Results of the IVR Study (Interactive Voice Response Study.)

Yet, despite this negative reaction, Pacific went ahead with its plans to implement Prompted Repeat Dialing.

3. The Commission, as well as Pacific, Received Complaints About Prompted Repeat Dialing

The Commission also has received many complaints regarding Prompted Repeat Redialing. Customers commenting to Pacific or the Commission either during the trials or after the service was implemented on a statewide basis were largely concerned about (1) Pacific soliciting on their telephone lines; (2) the service’s interference with their access to the Internet; and (3) the service’s effect on modems and their phone’s redial feature. From the comments:

“Pacific Bell has a recording which automatically plays when one dials a busy telephone number. It offers to redial the number when it is NOT busy for 95 cents. This is an intrusion on my private phone line and I believe it should not be automatically inflicted on telephone users. Will the PUC work to prohibit such intrusive advertising on personal phone lines (unless the buyer selects to have such an option)??? Thank you for your attention.” (Exhibit C-3, attachment to footnote 22; complaint to the Commission.)

* * *

“It was a gross imposition to have to listen to that message when I was trying to get on the Internet. The computer automatically dials another number that’s not busy and because your message broke in, it made the computer log off on the modem or broke the connection and it had to start all over and it never got around to dialing the number that wasn’t busy. It took five times before I finally got through on the first number and it was a big imposition, irritation, and I wouldn’t use it on a bet. I have sense enough to know when a busy signal is ringing and if I want to call later, I can call later. Take it off my phone, I hate it.” (Exhibit C-3, attachment to footnote 16, comment 956071886 in Pacific’s trials.)

* * *

“I’m calling regarding I really dislike the service because my personal telephone has a busy redial feature, which this service that you now have, makes my phone not work in its busy redial function so personally it does not work for me at all.” (*Id.*, comment 957286949.)

* * *

“This is to complain about Pacific Bell’s ongoing phase-in of an ‘enhancement’ to Repeat Dialing. Consumers who have been so upgraded, always without their permission (though there was advance notice, which probably most people don’t read), no longer get a busy signal when they call out to a busy line, and no longer have the option of using the auto-redial function that is built into many phones, fax machines and modems. Instead they get a lengthy message from PacBell suggesting that they should either press ‘3’ to be notified when the line is clear, at \$.95 a throw, or subscribe to the new service that has been thrust upon them for several more dollars a month. One can of course call them to have it removed. We have done so.

“...we should have had to ASK FOR this service, not GET RID of it...” (Exhibit C-3, attachment to footnote 23.)

Customers also had problems blocking Prompted Repeat Dialing. Customers have complained that they could not get through to the Business Office to have Prompted Repeat Dialing removed, or that they were told this new service could not be removed, or that they asked to have the service removed and it was not.

According to one customer complaining to the Commission shortly after Pacific implemented Prompted Repeat Dialing on a statewide basis:

“...I called the operator who told me she was inundated with requests to turn off[f] the ad but she could do nothing. I spoke with the operator’s supervisor who sympathized but told me I had to contact customer service tomorrow morning. He confided that he expected long waits from customer service because of the widespread discontent with this new advertisement.”
(Exhibit C-3, attachment to footnote 25.)

ORA’s witness, Dr. Johnston, testified as follows: “I personally found it troublesome that I had to go during work, as it turned out, to call Pacific to get the service blocked, and then I found out some two weeks later that it wasn’t blocked.”⁹

4. Pacific’s Position

Pacific believes that its implementation of Prompted Repeat Dialing complies with § 451. Pacific first argues that although it does not like to receive negative comments, it expected negative calls because the type of survey it conducted encourages negative callers. Pacific believes a large number of customers involved in the trial found the service useful, referencing the increased

⁹ RT, Volume 1 at 56: 16-19.

activations in repeat dialing, from 28 to 154 a day in Concord, from 75 to 334 a day in Visalia, and from 105 to 545 per day in San Diego.

We find the detailed, negative complaints Pacific received during the survey significant. Pacific designed its own survey and should not be able to discount the survey's results after the fact because most of the comments about Prompted Repeat Dialing are negative. A total of 76 out of 179,000 completed the survey. Out of the 44 detailed comments, all but two were negative, using very strong language to describe the service as "intrusive," "a gross imposition," and "annoying," among other things. Given that customers do not receive busy signals as frequently as they may have done so in the past (due to call waiting, etc.), and given the fact that not everyone who has problems with a service complains, these numbers are significant. Furthermore, the Commission also received many complaints about this service. Although increased activations indicate that some customers chose to use Prompted Repeat Dialing, that some customers might freely choose this service does not justify imposing it on all customers.

Pacific also argues that the number of complaints about Prompted Repeat Dialing has decreased dramatically as customers become accustomed to the change, and that initial problems in removing Prompted Repeat Dialing from customers' lines upon request have largely been resolved. However, we give these assertions little weight because Pacific does not keep track of the complaints received in its business offices or call centers, but only those received in its executive offices.

Pacific states that its affiliate, SBC Technology Resources, Inc., conducted tests to determine whether the prompt affected the operation of faxes and modems, and that the only problems identified were small delays in the redialing function of certain equipment. Pacific believes a small redialing delay

(a maximum of 18 seconds) is insignificant because the line being dialed would probably not be free if you redialed immediately. Pacific also argues that if many customers were adversely affected by the delay, it would currently be receiving a flood of complaints.

SBC Technology Resources tested two types of fax machines and four types of modems. Pacific could not testify how the particular brands of faxes and modems were chosen, but indicated that customers use thousands of different types of faxes and modems in California. The modems were not tested for a single busy signal to precede the prompt, notwithstanding that is how Pacific implemented the prompt in California. This type of testing does not constitute extensive testing prior to Pacific's implementation of the new service.

We also believe that the delays caused by Prompted Repeat Dialing are significant, and are an imposition for customers who did not affirmatively choose to have this service placed on their lines. Many customers objected to the delays in service. Although it is possible that some customers can reconfigure their own equipment to minimize such delay, they should not have to do so. And, as stated above, because Pacific does not keep track of complaints it receives at its business offices and call centers, we are not persuaded that customers have adjusted to this new service and have minimal complaints.

In summary, the manner in which Pacific implemented Prompted Repeat Dialing violates § 451 in that customer safety, health, comfort, and convenience were disregarded in Pacific's decision to place the burden on customers to reject a service which they did not request to begin with, which they do not affirmatively activate, which they must remove from their telephone lines, and which may interfere with their other equipment, such as faxes or modems.

D. Does Pacific's Implementation of Prompted Repeat Dialing Violate Pub. Util. Code § 2889.4?

Pub. Util. Code § 2889.4 provides:

“(a) A local exchange service provider that offers and charges for pay per use features that do not require an access code to be dialed to activate the service shall provide a new residential subscriber, including an existing residential customer ordering an additional line, during the verbal service order process, with information about those features. The representatives of a provider shall offer that subscriber blocking options for those features.”

The information Pacific should have provided customers prior to May 1, 2000, pursuant to § 2889.4(2)(A) and (B), includes detailed information about the ability to block those features, and a noticeable postcard size bill insert that may be returned in subscribers' bill envelope if they wish to block the service.

ORA argues that Pacific did not provide the information required by § 2889.4 to customers participating in the April and May 2000 trials. Pacific argues that § 2889.4 does not apply to Prompted Repeat Dialing because both Repeat Dialing and Prompted Repeat Dialing require the customer to press an access code in order to activate them. Even if § 2889.4 applies, Pacific argues it provided customers with adequate notice.

As stated above, Prompted Repeat Dialing is activated without customers' affirmative consent and is thus subject to § 2889.4. The prompt is heard on the line after a brief busy signal, without the customer activating the prompt. SBC's Marketing Service Description of Prompted Repeat Dialing included the following customer benefit:

“Passive Service – Customers no longer have to remember extra dialing codes when attempting to initiate Repeat Dialing. Currently, customers have to remember to hang up

and dial *66 to initiate Repeat Dial. This increases awareness of the service for widespread use.”

Pacific disagrees that Prompted Repeat Dialing is a passive service to which § 2889.4 applies, stating that it used the term “passive” service to mean that customers no longer have to remember to hang up and dial *66 to initiate the service. This is exactly the point. The prompt portion of the new Prompted Repeat Dialing service is played on customers’ lines without their consent and without customers dialing an access code, thus making it a “passive” service. That Pacific has bundled the prompt with a shortcut activation of the repeat dialing portion of the service does not change this conclusion.

Pacific also argues, assuming that § 2889.4 applies, that it provided customers with sufficient notice. However, Pacific provided the customers with a postcard containing blocking information in small print, and referring customers to an 800 number. Pacific shifted the burden to customers to affirmatively call Pacific if they wanted the prompt removed, but did not provide a bill insert that a customer could return in order to block the feature. We therefore conclude that Pacific violated § 2889.4.

E. Did Pacific Violate the Commission’s GO 96-A and Pub. Util. Code §§ 454 and 491 by Improperly Raising Rates?

ORA argues that Pacific raised the rates for both Repeat Dialing and Prompted Repeat Dialing without meeting GO 96-A’s requirements, and in violation of Pub. Util. Code §§ 454 and 491.

1. The Rate Increases

a) Repeat Dialing

Under the Commission’s New Regulatory Framework (NRF) decisions, some rate change proposals do not need to meet all of GO 96-A’s

requirements. Repeat Dialing is categorized as a Category II flexibly priced service. Pacific may exercise pricing flexibility for Category II services within approved price ceilings and floors by filing an advice letter. (See D.89-10-031, 33 CPUC2d 43, 233 at Ordering Paragraph 4; D.94-09-065, 56 CPUC2d 117, 264, citations omitted.) The Commission has waived Sections III, IV, V, and VI of GO 96-A so that price increases for flexibly priced services up to the approved price ceiling are effective on 30 days notice to affected customers.

Pacific complied with GO 96-A when it increased the price for per use Repeat Dialing from \$0.75 to \$0.95 by filing an advice letter. Pacific gave customers notice in Pacific's "Calling" newsletter, inserted in customers' bills at least 30 days prior to the June 2, 2000 effective date of the increase. The increase was within the pre-approved price floor and ceiling for per use Repeat Dialing. Therefore, Pacific did not violate GO 96-A with respect to its price increase for Repeat Dialing. Under similar rationale, Pacific did not violate Pub. Util. Code §§ 454 and 491 in raising the rate for Repeat Dialing. With regard to Prompted Repeat Dialing, however, the issue is significantly different as we explain below.

b) Prompted Repeat Dialing

Pub. Util. Code § 454 states in relevant part that:

"...no public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified."

Because we find that Prompted Repeat Dialing is a distinct service from Repeat Dialing, Pacific violated § 454 by offering a service that was not tariffed and with no preexisting price floor or ceiling. Pacific should have

filed a new application so that the Commission could review the effects on customers (pricing and otherwise) of the new bundled service.¹⁰

2. Rate and Service Change to Non-Published Customers

Pacific's residential customers pay extra for non-published service. Pacific's Tariff Schedule A.2¹¹ states that Pacific will not contact non-published residential customers by telephone on an unlisted number for unsolicited sales efforts.

We agree with ORA that Pacific violated § 454 because it placed Prompted Repeat Dialing on non-published customers' lines without their or the Commission's authorization, thereby contacting these customers with an unsolicited sales message. In so doing, Pacific violated its own tariffs and altered its contract and practice as to non-published customers, with the resulting impact

¹⁰ Pacific also technically violated GO 96-A when it raised the price of Prompted Repeat Dialing from the \$0.75 set during the trials to \$0.95 when it was offered on a statewide basis in July, because there was never a tariff for Prompted Repeat Dialing in the first instance.

ORA argues that although Pacific should have filed a separate application seeking authorization to offer Prompted Repeat Dialing, Pacific did not even meet the standards in GO 96-A, Rule III (c), for changes in service. That rule states, in relevant part:

"When the filing covers a new service not previously offered or rendered, the general effect of such filing should be explained. The advice letter should state whether or not present rates or charges will be affected, deviations or conflicts created, or service withdrawn from any present user."

Because we find that Pacific should have filed a separate application to offer Prompted Repeat Dialing, we do not find Pacific violated Rule III (c) because this requirement applies to advice letter filings. However, Pacific should have addressed the issue raised by Rule III (c) in its application.

¹¹ Tariff Schedule A.2, Rule 34.

on the non-published service rate. These customers continued to pay an extra \$0.28 per month to be free from unsolicited sales efforts, but were subjected to Prompted Repeat Dialing on their lines. Because Pacific did not file an application or otherwise justify this change in contract and practice with respect to these customers, Pacific violated § 454 with respect to these customers. For the same reasons, Pacific violated § 491 [requiring utility to give notice of a change affecting a rate or change in service], its Tariff Schedule A.2 as set forth above, and GO 96-A.¹²

Pacific argues that the prompt is not a solicitation, but is a purely informational enhancement, acting as a reminder to customers that the Repeat Dialing service exists on their lines to help them complete their calls. According to Pacific, this service is also a more convenient and efficient method for customers to access Pacific's Repeat Dialing service. For these reasons, Pacific argues that it did not change the rates or service of non-published customers. Pacific also argues that it has not violated its tariff whereby Pacific promises not to contact non-published residential customers by telephones on an unlisted number for unsolicited sales efforts, because the customer initiated the call and reached a busy signal. Furthermore, because Pacific believes this shortcut is especially beneficial for subscribers of Repeat Dialing on a monthly basis, it

¹² Rule VI of GO 96-A states that a utility must obtain Commission authorization before the utility can change its tariffs so as to increase a rate or charge, or result in a lesser service or more restrictive conditions at the same rate or charge. Prompted Repeat Dialing resulted in a lesser service or more restrictive conditions at the same rate or charge to non-published subscribers, without Commission authorization, because these subscribers pay an extra \$0.28 per month, in part, for the assurance that the utility will not contact them by telephone on an unlisted number for unsolicited sales efforts.

argues that Prompted Repeat Dialing is an enhancement to non-published monthly subscribers of Repeat Dialing.

We disagree with Pacific's rationale. Pacific's own "Marketing Service Description" described Prompted Repeat Dialing as a "self-advertising service." The vast majority of advertising is informational in whole or in part. What makes information "advertising" is that the information is unsought by the intended recipient. The fact that the information directly serves the commercial interests of Pacific further undermines the claim that the prompt is "purely informational."

Moreover, the record contains comments from customers who perceived the prompt as an advertisement. From the complaints:

"...Pacific is taking advantage of their monopoly status to effectively turn a relied-upon [signal] convention into advertising time. This is simply wrong." (Exhibit 4, 10/20/00 e-mail attachment to footnote 29.)

* * *

"I want to know if anything is being pursued re: the recent change in Pacbell's busy signal. This is inconvenient for 'redialing' features on computers, phones, and faxes; they can't tell when a line is busy.

"Plus, I don't want to hear [their] ad...(Id., e-mail dated 10/10/00.)"

* * *

"...I am complaining about Pacific Bell. Today they started advertising a new service called 'repeat dialing' when I dial a number which is busy. I did not request this unsolicited advertisement." (Exhibit C-3, attachment to footnote 25.)

A non-published subscriber registered his dissatisfaction with Prompted Repeat Dialing, and his perception that the prompt is in fact a solicitation:

“I too have been annoyed by the ads for the busy signal service. More than annoying, I find them very disruptive. And, as an ‘unlisted’ subscriber, I thought I was free from such things.

“My major complaint about this new ad message? It causes the ‘busy redial’ feature on my telephone to fail...” (Exhibit C-3, attachment to footnote 62.)

Pacific also cites to a decision by a Wisconsin Superior Court as persuasive and relevant.¹³ In that decision, the court reversed a decision of a state agency which found Ameritech Wisconsin’s “Enhanced Repeat Dialing” service, similar to Pacific’s Prompted Repeat Dialing service, to be an unsolicited telephone solicitation prohibited by statute, thereby violating Wisconsin’s unfair trade practices statute.

We are not bound to follow precedent from other jurisdictions. Moreover, the Wisconsin case addressed a particular statute defining “telephone solicitation” as “the unsolicited *initiation* of a telephone conversation for the purpose of encouraging a person to purchase property, goods or services.” The Wisconsin lower court’s decision turned, in part, on its finding that the Enhanced Repeat Dialing service did not initiate a conversation, but rather, interrupted a busy signal that has already notified the caller that the call cannot be completed. In contrast, Pacific’s tariffs prohibit it from *contacting* non-published residential

¹³ *Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin v. Dept. of Agriculture, Trade and Consumer Protection*, Case No. 00 CV 0843 (Wisconsin Cir. Ct. for Dane County January 5, 2001.)

customers by telephone on an unlisted number for unsolicited sales efforts. Contacting is a broader term than initiating. The prompt comes on customers' lines in the course of one customer calling another, and neither has called Pacific to inquire about a product or service. No one has given consent to this contact, and, by paying extra to be non-published customers, these customers have affirmatively denied Pacific permission to contact them by this or other means in order to solicit them. We therefore find the Wisconsin case distinguishable and decline to follow its holding.

F. ORA's Other Allegations

Pub. Util. Code § 495 requires telephone utilities to file with the Commission schedules showing all the rates and classifications for the transmission of messages and conversations between certain specified points. Pacific has a tariff on file for Repeat Dialing. ORA argues that Pacific violated § 495 for failing to file a separate tariff for Prompted Repeat Dialing.

We agree. As stated above, we find Prompted Repeat Dialing to be a new service. Pacific has no tariff on file which describes Prompted Repeat Dialing, by itself, or even as a component of Repeat Dialing.

ORA argues that Pacific violated Pub. Util. Code § 702 which requires compliance with every "order, decision, direction or rule made ...by the Commission." To the extent that Pacific violated GO 96-A and its own tariffs, as set forth above, we hold that Pacific violated § 702.

ORA also alleges that Pacific's implementation of Prompted Repeat Dialing on customers' lines without their consent violates the customers' right to privacy as guaranteed by the California Constitution.¹⁴ We decline to reach the

¹⁴ See Article I, Section 1 of the California Constitution.

constitutional issue in light of the fact that we have found numerous violations of statutes and Commission rules. However, we observe that the right to privacy will be observed under our decision since Pacific will have to obtain a customer's prior consent before deploying Prompted Repeat Dialing on that customer's telephone line.

G. Remedies

In our discussion above, we find that Pacific should have filed an application in order to offer Prompted Repeat Dialing. Because the Commission created a detailed record regarding Prompted Repeat Dialing service in this complaint case, we authorize Pacific to continue to offer this service on the following terms.

1. Notice to Customers

Pacific shall not continue to deploy Prompted Repeat Dialing on customers' lines without their affirmative consent. Therefore, no later than 60 days from the effective date of this decision, Pacific shall mail to all of its California customers with their bill a separate postcard insert seeking customers' written authorization for Pacific to continue to deploy Prompted Repeat Dialing on their lines. Pacific shall advise customers that Prompted Repeat Dialing will be removed from their telephone line at no charge unless Pacific receives the customers' written authorization within 120 days of the effective date of this decision. Pacific shall submit the content of the postcard for review to, and incorporate the suggestions of, the Commission's Telecommunications Division and Public Advisor prior to its mailing.

2. Tariffs

Pacific argues that the costs of Repeat Dialing and Prompted Repeat Dialing are the same, because the costs associated with the prompt are

non-volume sensitive costs which the Commission does not use to set the price floor for a service. Only the volume sensitive portion of the Total Long Run Incremental Cost of a service is used to set the price floor for the service. (See D.99-11-050, Conclusion of Law 75.) Therefore, the price for Repeat and Prompted Repeat Dialing may have similar prices.

However, as stated above, different services can have similar costs. We find that Repeat and Prompted Repeat Dialing are separate services. Therefore, no later than 30 days after the effective date of this decision, Pacific shall file an advice letter with separate tariff sheets for Prompted Repeat Dialing, on a subscription and per use basis.

3. Refund to Non-Published Customers

We find that Pacific violated its tariff with non-published residential customers which states that Pacific will not contact these customers by telephones on an unlisted number for unsolicited sales efforts. Residential customers pay an extra \$0.28 per month to be free from unsolicited service efforts. Therefore, we direct Pacific to refund to these customers \$0.28 per month for each month that Pacific deployed Prompted Repeat Dialing on the customers' line without their express consent. We include the time period of the trial within the refund period. No later than 30 days after the effective date of this decision, Pacific shall file an advice letter with its refund plan.

Pacific argues that its Prompted Repeat Dialing service is an enhancement for non-published customers who subscribe to Repeat Dialing, because it serves as a reminder of a service that they subscribe to. ORA's witnesses concurred with this position for these select customers. Therefore, Pacific presumably would argue that non-published customers who subscribe to Repeat Dialing should not be eligible for this refund.

We disagree. Repeat and Prompted Repeat Dialing are two separate services. This subset of non-published customers did not give their affirmative consent for the prompt to appear on their lines. We therefore require Pacific to include all non-published customers in its refund plan.

4. Pacific's Discussions With the Commission's Telecommunications Division

Pacific argues at length that it took many steps to ensure that it implemented Prompted Repeat Dialing with the knowledge and agreement of Commission Telecommunications Division staff. ORA does not believe Pacific fully informed staff, for example, of all aspects of this new service or the degree of customers' dissatisfaction with the service during the trial.

It is unnecessary to determine the specific details regarding Pacific's conversations regarding this new service with staff. Although utilities' discussions with staff prior to implementing a new service can be useful, for example, to assist in determining the type and scope of the trial and other technical issues, the staff does not speak for the full Commission. Thus, the facts that staff may not have objected to Pacific's implementation of Prompted Repeat Dialing or may not have informed Pacific that it was a new service, standing alone, are not defenses for Pacific in this action.

ORA did not request monetary penalties or sanctions against Pacific in its complaint. The Commission does not impose such penalties under the specific facts presented here, both because Pacific discussed its Prompted Repeat Dialing service with the Commission staff prior to its implementation, and because this case presents an issue of first impression as to the degree an existing service needs to change to constitute a new service. However, the fact that a utility may have prior discussions with staff about a particular service or offering

does not insulate them from penalties should the Commission find them otherwise appropriate.

H. Appeal of Presiding Officer's Decision

On July 5, 2001, pursuant to Rule 8.2 of the Commission's Rules of Practice and Procedure, Pacific filed an appeal of the Presiding Officer's Decision (POD) alleging numerous factual and legal errors. Based on the alleged errors, Pacific argues that the POD's outcome should be reversed, the Commission should not find Pacific to be in violation of various legal and regulatory requirements, and the Commission should find that ORA lacks standing to file the complaint. ORA filed a response opposing Pacific's comments and requesting the Commission to adopt the POD.

Pacific's appeal raises the same arguments it has made throughout the case. The POD addresses these arguments, and that discussion need not be repeated here. We affirm the POD, but make several minor changes to improve the discussion and to correct typographical errors.

The following is a summary of Pacific's arguments on appeal and a designation (in parenthesis) of where they are addressed in the POD: ORA lacks standing (Section IV.A); Pacific's discussions with the Commission's Telecommunication's Division justify its conduct (Section IV.G.4); Repeat Dialing and Prompted Repeat Dialing are the same service (Sections II.A, IV.B); the POD errs in finding that Pacific violated Pub. Util. Code § 451 (Section IV.C), § 2889.4 (Section IV.D), and § 454 (Section IV.E); Pacific's implementation of Prompted Repeat Dialing on non-published customers' service lines did not violate various statutory and regulatory requirements (Section IV.E and F); the POD errs in applying § 495 to Prompted Repeat Dialing (§ IV.F); and the POD imposes "unwarranted" remedies on Pacific (Section IV.G).

Findings of Fact

1. Pacific's Repeat Dialing Service allows the customer to perform an activation procedure (dialing "*66" from most telephones, or in the case of a rotary phone, "1166") to automatically redial the last number called from his or her telephone. The customer can do so whether the call was answered, unanswered, or busy. Once activated, the system would attempt to connect the call for up to 30 minutes, and would alert the customer with a distinctive ring when both the called party and the customer's line were free.

2. Pacific first tariffed its Repeat Dialing service in 1992 on a subscription only basis, and began offering this service in 1996 on a pay per use basis.

3. Pacific's tariff for pay per use Repeat Dialing states that it functions the same as the service offered on a subscription basis.

4. In April and May 2000, Pacific conducted a trial in three California cities, where it sought customer reaction to a service which began by interrupting customers' busy signals after one second to play the following prompt:

"The number is busy. For 95 cents, let Repeat Dialing call you back when the line is free. To use it, just press 3. If you subscribe to Repeat Dialing, there is no additional charge."

5. In July 2000, Pacific began placing the prompt linked with Repeat Dialing on customers' lines on a statewide basis.

6. Prompted Repeat Dialing functions substantially differently from Repeat Dialing.

7. Prompted Repeat Dialing is a new service distinct from Repeat Dialing.

8. Pacific implemented Prompted Repeat Dialing on customers' telephone lines without their affirmative consent.

9. Different services can have similar costs.

10. Customer safety, health, comfort, and convenience was disregarded when Pacific placed the burden on customers to eliminate a service which they did not request to begin with, which they do not affirmatively activate, and which may interfere with their other equipment, such as fax machines and modems.

11. Pacific decided to implement Prompted Repeat Dialing without evidence of customer need in that Pacific did not analyze whether California customers desired this new service.

12. Pacific's California trial for Prompted Repeat Dialing elicited a negative response. The Commission has received many complaints about this new service.

13. Pacific does not keep track of the complaints received in its business offices or call centers, but only those received in its executive offices.

14. SBC Technology Resources Inc.'s testing of the interaction of Prompted Repeat Dialing with fax machines and modems prior to implementing this service in California was not extensive.

15. The delays caused by Prompted Repeat Dialing are significant, and are an imposition for customers who did not affirmatively choose to have this service placed on their lines.

16. Prompted Repeat Dialing is activated without customers' affirmative consent; the prompt is heard on the line after a brief busy signal, without the customer activating the prompt.

17. Pacific shifted the burden on customers to affirmatively call Pacific if they wanted the prompt removed, but did not provide a bill insert that a customer could return in order to block the feature.

18. Pacific increased the price for Repeat Dialing from \$0.75 to \$0.95 by filing an advice letter and giving customers notice in Pacific's "Calling" newsletter inserted in customers' bills at least 30 days prior to the effective date of the

increase. The increase was within the pre-approved price floor and ceiling for per use Repeat Dialing.

19. When it implemented Prompted Repeat Dialing, Pacific offered a new service that was not tariffed and did not have a preexisting price floor or ceiling.

20. Pacific's residential customers pay \$0.28 extra per month for non-published service.

21. The prompt portion of Pacific's Repeat Dialing service is an unsolicited sales message if it appears on customers' telephone lines without their affirmative consent.

22. By paying extra to be non-published customers, these customers have affirmatively denied Pacific permission to contact them by the prompt or other means for solicitation purposes.

23. The costs associated with the prompt are non-volume sensitive costs which the Commission does not use to set the price floor for a service.

24. The subset of non-published residential customers who subscribe to Repeat Dialing did not give Pacific permission to have Prompted Repeat Dialing placed on their telephone lines.

Conclusions of Law

1. Under Pub. Util. Code § 1702, a complainant must prove an alleged violation of a specific standard contained in a statute, rule or order of the Commission, or a tariff which has been approved by the Commission. The standard of proof is by a preponderance of the evidence.

2. ORA has standing to bring this complaint, under Pub. Util. Code § 309.5, and the December 18, 2000 ALJ ruling so holding should be affirmed.

3. In determining whether Repeat and Prompted Repeat Dialing are the same or distinct services, we consider how the services function on Pacific's system and how they function from the customers' perspective.

4. Pacific's implementation of Prompted Repeat Dialing violated Pub. Util. Code § 451, § 454, § 491, § 495, § 702, § 2889.4, GO 96-A, and its Tariff Schedule A.2.

5. Pacific did not violate General Order 96-A or Pub. Util Code §§ 454 and 491 with respect to its price increase for Repeat Dialing.

6. Pacific should not continue to deploy Prompted Repeat Dialing on customers' lines without their affirmative consent.

7. No later than 60 days from the effective date of this decision, Pacific should mail to all of its California customers with their bill a separate postcard insert seeking customers' written authorization for Pacific to continue to deploy Prompted Repeat Dialing on their telephone lines. Pacific shall advise customers that Prompted Repeat Dialing will be removed from their telephone line at no charge unless Pacific receives the customers' written authorization within 120 days of the effective date of this decision. Pacific should submit the postcard for review to, and incorporate the suggestions of, the Commission's Telecommunications Division and Public Advisor prior to its mailing.

8. No later than 30 days after the effective date of this decision, Pacific should file an advice letter with separate tariff sheets for Prompted Repeat Dialing on a subscription and per use basis.

9. Pacific should refund to all non-published residential customers the \$0.28 per month that these customers paid for non-published service for each month that Pacific deployed Prompted Repeat Dialing on the customers' telephone line without their express consent. The time period of the trial should be included within the refund period. No later than 30 days after the effective date of this

decision, Pacific should file an advice letter with its refund plan. Pacific should serve this advice letter on the service list of this proceeding, as well as on the Commission's Public Advisor.

10. The facts that staff may not have objected to Pacific's implementation of Prompted Repeat Dialing or may not have informed Pacific that it was a new service are, standing alone, not defenses for Pacific in this action.

11. Monetary penalties against Pacific should not be imposed under the specific facts presented here, both because Pacific discussed its Prompted Repeat Dialing service with the Commission staff prior to its implementation and because this case presents an issue of first impression as to the degree an existing service needs to change to constitute a new service.

12. This decision should be effective immediately in order to limit the further imposition of Prompted Repeat Dialing on nonconsenting customers.

O R D E R

IT IS ORDERED that:

1. The Office of Ratepayer Advocate's (ORA) complaint against Pacific Bell Telephone Company (Pacific) is granted to the extent set forth in the Conclusions of Law above.

2. The December 18, 2000 Administrative Law Judge ruling denying Pacific's motion to dismiss the complaint due to ORA's lack of standing is hereby affirmed.

3. No later than 60 days from the effective date of this decision, Pacific shall mail to all of its California customers with their bill a separate postcard insert seeking customers' written authorization for Pacific to continue to deploy Prompted Repeat Dialing on their telephone lines. Pacific shall advise customers

that Prompted Repeat Dialing will be removed from their telephone line at no charge unless Pacific receives the customers' written authorization within 120 days of the effective date of this decision. Pacific shall submit the content of the postcard for review to, and incorporate the suggestions of the Commission's Telecommunications Division and Public Advisor prior to its mailing.

4. No later than 30 days after the effective date of this decision, Pacific shall file an advice letter with separate tariff sheets for Prompted Repeat Dialing on a subscription and per use basis.

5. Pacific shall refund to all non-published residential customers the \$0.28 per month that these customers paid for non-published service for each month that Pacific deployed Prompted Repeat Dialing on the customers' telephone line without their express consent. The time period of the trial shall be included within the refund period. No later than 30 days after the effective date of this decision, Pacific shall file an advice letter with its refund plan. Pacific shall serve this advice letter on the service list of this proceeding, as well as on the Commission's Public Advisor.

6. Pacific's appeal of the Presiding Officer's Decision is denied.

7. This case is closed.

This order is effective today.

Dated August 23, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

I will file a dissent.

/s/ HENRY M. DUQUE

C.00-08-053 ALJ/JJJ/MOD-POD/tcg

Commissioner

Commissioner Henry M. Duque dissenting:

I agree with 75% of those surveyed by Pacific who said that they find Prompted Repeat Dialing annoying. People whose fax machines malfunctioned, and those who became annoyed by the unsolicited sales pitch for PRD were justifiably vexed. But the Commission authorized this annoying service when the staff gave Pacific the go-ahead to deploy it. The problem should be fixed now, however, findings of violations and refunds are not warranted. The majority decision is fundamentally flawed because it finds violations of Commission standards and orders refunds as if Pacific acted on its own without Commission authorization.

ORA's allegation that Pacific violated Commission orders and standards must be considered within the context of staff's approval of this service. Staff has the authority to approve these requests. Utilities rely on staff's approval to comply with Commission standards and prevent violations. Holding Pacific responsible for an act that the Commission's staff blessed in the first place nullifies staff's administrative authority and the meaning of staff review and approval of utilities' requests. What purpose would it serve utilities to consult Commission staff if any direction given by the staff and followed by utilities could be used against them to find a violation of commission standards?

This is not to say that Pacific in this case should continue to offer PRD in its present form with the annoying deficiencies. Nor does it mean that ORA has no right to bring this type of complaint before the Commission just because staff had approved it. However, findings of violations and refunds are unjustified.

The majority decision also concerns me because it sends the message that staff's advice and approval have no value.

For all the above reasons, I will dissent.

/s/ HENRY M. DUQUE

Henry M. Duque
Commissioner

August 23, 2001
San Francisco, California